

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

ORDER

P-003

Government Motion for Continuance

1. On 16 September 2009 the Government filed a motion requesting a third continuance in this case, until on or after 16 November 2009, to allow the executive branch to complete its evaluation and recommendation regarding the forum for trial of this matter, as well as for Congress to enact revisions to the Military Commissions Act and for the Department of Defense to promulgate new regulations reflecting those proposed statutory changes. The Commission previously granted the government two continuances in the interest of justice for these reasons, for the eight months since 22 January 2009. The defense opposes this continuance, and requests dismissal of the case.

2. On 24 August the Commission granted a defense motion for a new sanity board in this case. On 31 August the defense requested an additional delay in the deadlines for completing the sanity board until 9 November 2009, and that motion was granted by this Commission on 29 September 2009.

3. The Commission notes that 16 November 2009, the date requested by the United States as the end date of its requested continuance, is the first available date on which proceedings could be conducted at Guantanamo Bay after the completion of the sanity board report on 9 November 2009. Thus, the government is requesting at most a 7 day delay beyond that already approved by this Commission, and in reality is requesting no delay at all.

4. The Military Commission finds that the facts and law regarding this motion are completely articulated in the written pleadings received, that the defense request for oral argument essentially repeats the same arguments raised by the defense at oral argument conducted on the second continuance motion. The Commission finds that while there is a possibility that Congress may determine that the offense of "material support for terrorism" will not ultimately be tried in a Military Commission, the law has not changed. As of today, "Material support for terrorism" remains a viable offense under the Military Commissions Act. The Commission finds that it would be premature to dismiss the Charge in this case based on speculation regarding what Congress may or may not do. The Commission further finds that oral argument regarding this motion would not meaningfully assist the Commission in rendering a decision in this matter.

5. Accordingly, it is ORDERED that:

(a) The government motion for a continuance until 16 November 2009 is GRANTED. The Commission finds that the requested continuance does not delay any proceedings in this case beyond the extensions of time already granted to the defense in this case for completion of the RMC 706 reports; that the interests of justice are served by granting the requested continuance in this case and that such interests outweigh the best interests of both the public and the accused in a prompt trial.


(b) A hearing is set to decide the mental responsibility and mental capacity of the accused on November 16, 2009 at Guantanamo Bay, Cuba.

(c) The defense motion to dismiss the Charge and its Specifications with prejudice is DENIED

6. All time from 23 January 2009 through 16 November 2009 will be excluded from speedy trial requirements under RMC 707.

7. This order and the pleadings related to it are authorized for public release pursuant to Rule 3.9 of the Rules of Court.

So Ordered this 1st day of October 2009.


W. Thomas Cumbe
Colonel, U.S. Air Force
Military Judge

UNITED STATES OF AMERICA)
)
 v.)
)
 MOHAMMED KAMIN)
)
)

GOVERNMENT MOTION
For Appropriate Relief

16 September 2009

1. Timeliness. This motion is timely filed.

2. Relief Requested. In the interests of justice, the Government respectfully requests the Military Commission grant an additional 60-day continuance of the proceedings in the above-captioned case until 16 November 2009.¹

3. Overview. The Government requests this continuance for an additional period of only 60 days. The review process that has necessitated the Government's requests for continuances in this case is nearing completion. By no later than 16 November 2009, Guantanamo Review Task Force will have completed its review of Kamin's case, and will have made a recommendation regarding whether the Government will continue to prosecute Kamin before this commission or pursue some other alternative. Executive Order 13492 (E.O. 13492, 74 Fed. Reg. 4897) requires the Secretary of Defense to take steps "sufficient to halt the proceedings" in this case until a decision is made whether and in what forum to prosecute this case. In addition, in May the President announced his support for military commissions reform and his commitment to work with Congress to amend the Military Commissions Act of 2006. In July, legislation to reform military commissions passed the Senate. House and Senate conferees are expected to meet to consider this legislation in late September/early October, and it is expected that the Defense Authorization bill will become law sometime later in October or in November. Given these circumstances, the interests of justice in one further 60-day continuance outweigh the interests of both the public and the accused in immediately proceeding forward.

4. Burden of proof and of persuasion. As the moving party, the Government bears the burden of persuasion. Rule for Military Commissions (R.M.C.) 905(c), Manual for Military Commission (M.M.C.), 2007.

5. Facts.

a. On 22 January 2009, the President issued E.O. 13492, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities." That E.O. remains fully in effect and applies to all members of the Executive Branch. It directed an inter-agency review of "the status of each individual currently detained at Guantanamo" E.O. 13492, §4(a), 74 Fed. Reg. at 4898. The review participants were first tasked to "determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantanamo, whether it is

¹ The Government is seeking similar continuances in the other cases pending before military commissions.

possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States" *Id.*, §4(c)(2), 74 Fed. Reg. at 4899. In cases of individuals not approved for release or transfer, the review participants were tasked "to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution" *Id.*, §4(c)(3), 74 Fed. Reg. at 4899. To facilitate those two tasks, the Secretary of Defense was directed to "ensure that during the pendency of the Review . . . all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered . . . are halted." *Id.*, § 74, Fed. Reg. at 4899. During the pendency of the Review, E.O. 13492 remains in full effect so that no "proceedings" may go forward.

b. On 22 January 2009, the President also issued E.O. 13493, "Review of Detention Policy Options" (74 Fed. Reg. 4901). E.O. 13493 established a Detention Policy Task Force, co-chaired by the Attorney General and the Secretary of Defense, "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." E.O. 13493, § 1(e), 74 Fed. Reg. at 4901.

c. In accordance with E.O. 13492 and the Defense Secretary's directive thereunder, the Government sought and obtained an initial continuance of this case in January 2009 that lasted until 20 May 2009. A second continuance was sought at the end of the first and is scheduled to expire on 17 September 2009.

d. In his speech at the National Archives on 21 May 2009, President Obama recognized that "military commissions have a history in the United States dating back to George Washington and the Revolutionary War . . . [and that t]hey are an appropriate venue for trying detainees for violations of the laws of war." The President announced then that he had decided to work to reform and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo. Also in May the Secretary of Defense published and notified Congress of five significant changes to the M.M.C. which were recommended by the Detention Policy Task Force.

e. Legislative reform of the Military Commissions Act is now also pending. On 23 July 2009, the Senate passed significant changes to the law as part of the Defense Authorization Act for FY 2010. S.1390, Title X, Subtitle D, §§ 1031 *et seq.*, Roll call Vote No. 242, 115 Cong. Rec. 112 at S.8023 (July 23, 2009). Conferees from the Senate and House are expected to meet in late September or early October to consider these reforms. The full Congress is likely to pass the Defense Authorization bill sometime in October or November.

f. Related to the review process, in July the Departments of Justice and Defense agreed to a protocol pursuant to which cases referred for possible prosecution by the Guantanamo Review Task Force will be further considered by a joint DoJ-DoD team of prosecutors to determine whether the case should be prosecuted in an Article III court or by military commission. Kamin was not recommended for prosecution in an Article III court by the Guantanamo Review Task Force and, as such, is not being considered under this protocol.

g. Under E.O. 13492, the Secretary of Defense must ensure that proceedings before military commissions are halted until the Review is complete. Matters not considered proceedings have occurred within the military commissions since the issuance of the E.O. and have not changed the *status quo* of the pending cases.

6. Argument.

a. R.M.C. 707(b)(4)(E)(i) authorizes the presiding judge of a military commission to grant a continuance of the proceedings if the interests of justice are served by such action and outweigh the best interests of both the public and the accused in a prompt trial of the accused. The requested continuance is in the best interests of justice because it will permit the Presidentially-directed review of Kamin to be completed and will permit the full Congress time to act on the pending military commissions' reform legislation.

b. The interests of justice served by granting the continuance outweigh the interests of both the public and the accused in immediately proceeding forward. The review of the detainees' status and the pending legislative amendments to the MCA may result in changes that will (1) necessitate re-litigation of issues in this case or (2) produce legal consequences affecting the options available to both the accused and the Government. It would be inefficient and potentially unjust to deny the requested continuance when the MCA is currently being reformed by the Congress and before the Guantanamo Review Task Force has completed its review and made a prosecutorial or other disposition decision regarding the accused.

c. Extending the continuance in this case for a final 60 days will give the Administration adequate time to complete its review and the Congress a similar opportunity to reform the MCA -- all to ensure that the interests of justice, as well as the national security and foreign policy interests of the United States, are best served. Under these circumstances, an additional 60-day delay is not prejudicial to the accused and is consistent with the interests of the public.

7. Scope of Request.

a. Concerns have been raised about the scope and effect of the continuances that the Government has sought and that the judges have granted in this case and others before the military commissions. E.O. 13492 directs the Secretary of Defense to take "steps sufficient to ensure that during the pendency of the Review . . . all proceedings of

[the] military commissions . . . are halted.” It was in furtherance of that obligation that the Secretary originally directed the Chief Prosecutor to seek continuances in January 2009.²

b. The Government does not seek to preclude the parties from submitting any filings during the requested continuance, should they desire to do so, or to prevent any judge from scheduling and hearing a matter deemed to be something other than a proceeding, and thus not precluded by E.O. 13492. The twofold purpose of this motion is (1) to preserve the *status quo* as it existed on 22 January 2009 and as it exists today, and (2) to preclude any judicial decisions or rulings on dispositive issues until the Guantanamo Review Task Force completes its review and makes a final disposition decision and until the legislation now pending in Congress to reform military commissions becomes law. For those reasons, the Government requests this military commission to refrain from taking any actions in the case -- whether or not any "sessions" of a commission may occur -- with the exception of any rulings that must be made (including a ruling on the instant motion itself) to preserve the *status quo* of the case to the greatest extent practicable.

8. Conclusion: For the foregoing reasons, the military commission should extend the previously granted continuance of further proceedings in the above-captioned case until 17 November 2009 and should adopt the attached Findings of Fact, Conclusions of Law, and Order. (Attachment B). Additionally, this delay should be excluded when determining whether any period under R.M.C. 707(a) has run.

9. Oral Argument: The Government does not request oral argument but is prepared to argue this motion should the commission find it helpful.

10. Witnesses and Evidence: No witnesses. The Government respectfully requests the commission to consider Attachment A to this motion as evidence of the asserted facts.

11. Certificate of Conference: The Government notified the Defense of the requested relief and the Defense did not object, but may modify its stance once it has the

² The Government's original motion in January did not attempt to define the scope of the requested continuances. In some cases, however, the military judges defined the scope of a continuance at the time it was ordered. In the case of *United States v. Ghailani*, for instance, the continuance issued by the military judge expressly contemplated that discovery by the parties would continue and that the judge would continue to take certain actions not requiring a "session." See Ruling on Government Motion for Continuance, *United States v. Ghailani* (Feb. 13, 2009). Similarly, in the case against the September 11th co-conspirators, *United States v. Mohammed et al.*, the military judge issued a ruling (in response to a defense motion for relief regarding the submission by the accused to the commission of a document) in which he assumed the prosecutors had not sought (and he, in an earlier ruling on the continuance, had not ordered) "a 'halt' to any and all actions related to this case, but merely on-the-record hearings with counsel, the accused, and the military judge." The judge concluded that his ruling was consistent with the prosecution's request and his earlier grant of a continuance, because "[s]ince recessing on 21 January 2009, the military judge has not called the Military Commission into session." Order on Defense Motion for Special Relief, *United States v. Mohammed* (Mar. 18, 2009)(emphasis added). See R.M.C. 905(h) (providing that the military judge may dispose of written motions without a session of the commission). In *United States v. Khadr*, the military judge has conducted two hearings of record, both during the pendency of E.O. 13492, to resolve issues of counsel conflict. Finally, in both this case and *United States v. Noor*, the judge has allowed discovery to proceed during the continuance.

opportunity to review the basis for, and the scope of, the continuance sought.

12. Attachments:

- A. Declaration of Hon. Jeh C. Johnson
- B. Government Proposed Findings of Fact, Conclusions of Law, and Order

13. Submitted by:



Rachel E. Trest
LT, JAGC, USN
Trial Counsel

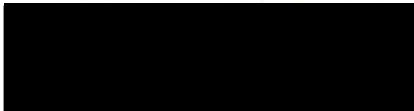
 

Michael D. Wallace
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Assistant Trial Counsel

Office of the Military Commissions
Office of the Chief Prosecutor



ATTACHMENT A

DECLARATION OF JEH C. JOHNSON

Pursuant to 28 U.S.C. § 1746, I, Jeh C. Johnson, hereby declare:

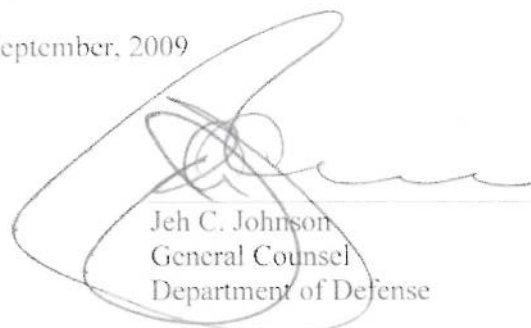
1. I am the General Counsel for the Department of Defense. As such, I serve as the chief legal officer for the Department of Defense and the legal advisor to the Secretary of Defense. I was appointed to this position on February 10, 2009, following nomination by the President and confirmation by the Senate. The statements made herein are based on my personal knowledge and information made available to me in my official capacity.

2. President Barack Obama signed Executive Orders 13492 and 13493 on January 22, 2009. These Executive Orders require a comprehensive review of each individual detained at Guantanamo Bay, Cuba and of our nation's detention policy in general. An inter-agency task force and several inter-agency review teams were created as a result of Executive Order 13492. The task force and review teams are now diligently reviewing the Guantanamo detainees' files and recommending the transfer, release or prosecution or other disposition for each detainee. Cases referred for possible prosecution then require a team of prosecutors from the Department of Justice and the Office of Military Commissions to further investigate and recommend whether to prosecute the detainee in a federal civilian court or before a military commission. At present, more than half of the over 200 Guantanamo detainees have been reviewed in this process, and the process is on-going.

3. The Attorney General, after consulting with the Secretary of Defense, will decide, and this commission will be informed, within 60 days from 17 September 2009 whether the accused in this case will be prosecuted in federal court or by military commission, or referred back to the Executive Order 13492 Review for other appropriate disposition. Once a prosecution forum decision, if any, is made, the review process ordered by Executive Order 13492 will be complete and the halt in proceedings required by Section 7 of the Executive Order will be lifted with respect to that detainee.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 15th of September, 2009



Jeh C. Johnson
General Counsel
Department of Defense

ATTACHMENT B

UNITED STATES OF AMERICA

**Government Proposed Findings of Fact,
Conclusions of Law, and Order**

16 September 2009

v.

MOHAMMED KAMIN

1. On 16 September 2009, the Government moved to continue for 60 days all proceedings in the captioned case until 16 November 2009. (P-3).

2. The Defense responded to the Government's motion on __ September 2009. (D-__).

3. After reviewing the parties' submissions and considering the record in the case, the Commission makes the following findings of fact:

a. The President signed Executive Order 13492 on 22 January 2009 and thereby directed a comprehensive, inter-agency review of the status of all individuals detained at Guantanamo Bay, Cuba, to determine whether any of them could be transferred or released and, if not, whether and how they should be prosecuted for any offenses they might have committed.

b. In Executive Order 13492, the President also directed the Secretary of Defense to assure that during the required review no charges against any Guantanamo detainee would be sworn or referred to a military commission and that proceedings before each commission to which a referral of charges had already been made would be halted. The Secretary of Defense thereupon directed the Chief Prosecutor in the Office of Military Commissions to seek 120-day continuances in those cases already referred to military commissions.

c. The Chief Prosecutor in the Office of Military Commissions moved for a 120-day continuance of all proceedings in this case on 23 January 2009. That motion was granted, and all proceedings were thus continued until 20 May 2009. The Chief Prosecutor moved for a second, 120-day continuance on 15 May 2009 to allow for additional time to conduct the review required by Executive Order 13492. That motion was also granted, and all proceedings in the case were further continued until 17 September 2009.

d. On 16 September 2009, the Chief Prosecutor moved for a third continuance of all proceedings in the case for a final 60 days – *i.e.*, until 16 November 2009. His motion recites several factors justifying the requested relief. Among others, he notes that the inter-agency review required by Executive Order 13492 has progressed to the stage where recommendations are being formed as to whether and how the Guantanamo detainees should be prosecuted for offenses they have allegedly committed. Attached to the Chief Prosecutor's motion is a declaration from the General Counsel of the Department of Defense stating that during the 60 days of the requested continuance the Attorney General of the United States will have considered all recom-

mendations concerning those detainees being evaluated for prosecution and will have decided whether to allow prosecution of the accused to proceed in a military commission or refer the case back to the E.O. 13492 Review for other appropriate disposition.

e. On 23 July 2009, the United States Senate passed Senate Bill S. 1390, the National Defense Authorization Act for Fiscal Year 2010. Title X, Subtitle D, of that bill contains the Senate's amendments to the Military Commissions Act of 2006, Public Law 109-366, 120 Stat. 2600.

4. Based upon the foregoing findings of fact, the Commission reaches the following conclusions of law:

a. Completion of the executive branch's review of the status of all detainees at Guantanamo Bay, Cuba, could profoundly affect this case. If the Attorney General were to decide that the accused should be prosecuted in U.S. District Court, the Convening Authority would presumably dispose of this case by withdrawing all charges against the accused now before this Commission.

b. The legislative branch's impending amendment of the Military Commissions Act of 2006 could also profoundly affect this case. Interlocutory rulings that have preceded the effective date of those amendments may be rendered moot. Furthermore, issues litigated before that date might have to be re-briefed and re-argued based on changes to the governing statutes and applicable rules.

c. A 60-day continuance will avoid wasted effort in litigating issues that might be rendered moot or that might have to be re-litigated because of statutory and regulatory changes.

d. The interests of justice served by a final, 60-day continuance in this case outweigh the best interests of both the public and the accused in a prompt trial.

e. The Government has not requested this continuance for the purpose of unnecessary delay or for any other inappropriate reason. Its motion is for an appropriate period of time in light of Executive Order 13492 and the current state of the executive branch's compliance with that order.

f. This delay should be excluded when determining whether any time period under Rule for Military Commission (R.M.C.) 707(a) has run.

5. It is therefore ordered by this military commission that

a. Further proceedings in this Commission are continued from the expiration date of the immediately succeeding continuance until 16 November 2009.

b. During the pendency of this continuance, the parties are not prohibited from filing any papers they may desire to submit to this Commission. Hearings on those submissions could be scheduled, provided no breach of E.O. 13492 thereby occurs.

c. All delay between the expiration date of the previous continuance and 16 November 2009 shall be excluded when determining whether any time period under R.M.C. 707(a) has run.

Date: XX September 2009

W. THOMAS CUMBIE, Colonel, USAF
Military Judge

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

P-003

Defense Response

To the Government Motion for
Appropriate Relief Seeking a 60-day
Continuance of the Proceedings

23 September 2009

1. **Timeliness:** This Response is timely filed. *See* RC 3.6.b.
2. **Relief Sought:** Detailed defense counsel for Mr. Mohammed Kamin¹ respectfully requests the Commission abate the proceedings and order the charges withdrawn and dismissed with prejudice.
3. **Overview:**
 - a. For Two Thousand Three Hundred Twenty Five (2,325) days – nearly 6 ½ years – Mohammed Kamin has been a prisoner of the United States of America. He has not been convicted of a crime. His petition for writ of *habeas corpus* has not been adjudicated.² He has remained in pre-trial confinement, on a charge that the Department of Defense General Counsel disavows is even a law of war offense that can be tried by military commission, in a forum that even the President has acknowledged has fallen far short of the protections afforded by the United States Constitution and Geneva Conventions, and on a timeline with endless delays and zero chance of the government being prepared to proceed to trial at the expiration of the current requested 60-day continuance.
 - b. The government's requested scope of continuance seeks to strip the Military Judge of all power to decide dispositive issues in the case. "The Military Judge

¹ Detailed defense counsel file this Motion solely under the authority provided by the Commission on 21 May 2008 that detailed defense counsel shall represent the accused in this case and engage in the discovery process. The Commission ordered detailed defense counsel to represent Mr. Kamin because "the statute requires it" and because "discovery issues and all of the information that would be necessary for you to get your defense rolling." *See Transcript of Hearing ICO United States v. Kamin*, May 21, 2008 (Draft), pg. 42. CPT West was detailed to the case on 29 January 2009, after the 21 May 2008 hearing.

² Mr. Kamin exercised his constitutional privilege by filing a petition for writ of habeas corpus in the U.S. Federal District Court, District of Columbia, in the action titled *al Hamandy, et. al. v. George W. Bush, et. al.*, Civil Action No. 05-2385 (ESH). On 4 September 2009, the district court stayed the habeas action pending appointment of a federal public defender and filing of a representation authorization order.

has the power and responsibility to force the Government to proceed with its case if justice so requires.” See *United States v. Cooper*, 58 M.J. 54, 60 (C.A.A.F. 2003) quoting *United States v. Doty*, 51 M.J. 464, 465-66 (C.A.A.F. 1999). If the government is not prepared to proceed, as is reflected by the continuances requested in P-001, P-002, and now P-003 (with no end in sight), it should withdraw and dismiss the charge before this Commission. As the government has refused to do so, despite several requests by the defense, the Commission should exercise its inherent supervisory power and dismiss the charge with prejudice. See R.M.C. 707(d).

4. Burden and Standard of Proof: The defense concurs with the prosecution that, as the moving party, the government bears the burden of persuasion. See R.M.C. 905(c).

5. Facts:

a. Mr. Mohammed Kamin is a native of Afghanistan. He was captured in the Khowst Region, Afghanistan on or about 14 May 2003. Shortly thereafter, he was transferred to Bagram Air Base, Afghanistan, where he was detained in the custody of the United States. In September 2004, Mr. Kamin was transferred to the U.S. Naval Station, Guantanamo Bay, Cuba (GTMO) where he continues to be confined in isolation under the authority of the Commander, Joint Task Force Guantanamo (JTF-GTMO). He has been confined as a prisoner of the United States for Two Thousand Three Hundred Twenty Five (2,325) consecutive days – nearly 6 ½ years.

b. The Charge was preferred against Mr. Kamin on 11 March 2008 for six Specifications of Providing Material Support for Terrorism. See 10 U.S.C. § 950v(b)(25). The Charge and Specifications were referred for trial by military commission on 4 April 2008.

c. On 29 January 2009, a Pentagon spokesman, Mr. Geoff Morrell, said at a briefing that “this department will be in full compliance with the president's executive order. . . . And so while that executive order is in force and effect, trust me, there will be no proceedings continuing down at Gitmo with military commissions.” See Peter Finn, “Guantanamo Judge Denies Obama’s Request for Delay,” *Washington Post*, 30 January 2009. Additionally, Mr. Morrell stated, “[b]ut the bottom line is, we all work for the president of the United States in this chain of command, and he has signed an executive order which has made it abundantly clear that until these reviews are done all [legal activity at Guantanamo] is on hiatus.” Gerry J. Gilmore, “Military Commissions Must Obey President’s Directive, Official Says,” *American Forces Press Service*, 29 January 2009.

d. In testimony dated 8 July 2009 before the Senate Armed Services Committee, Department of Defense General Counsel, the Honorable Jeh Johnson, stated that he was “speaking on behalf of the Administration” and that “after careful study, the Administration has concluded that appellate courts may find that ‘material support for terrorism’ – an offense that is also found in Title 18 – is not a traditional violation of the law of war. As you know, the President has made clear that military commissions are for

law of war offenses. We thus believe it would be best for material support to be removed from the list of offenses triable by military commission.” AE 35.

e. In testimony dated 8 July 2009 before the Senate Armed Services Committee, Assistant Attorney General and head of the Department of Justice National Security Division, Mr. David Kris, stated that “[t]here are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is NOT a traditional law of war offense, thereby reversing hard-won convictions, and leading to questions about the system’s legitimacy.” AE 36. Assistant Attorney General Kris repeated similar comments to the House Armed Services Committee on 24 July 2009, changing the word “risk” to “likelihood.”

f. In a ruling on P-002 dated 23 July 2009, the Commission declined to order the Charge and all Specifications withdrawn and dismissed with prejudice. The Commission further granted the government’s 120-day continuance request. Additionally, the Commission noted specifically that material support remains an offense under the Military Commissions Act and that “it would be premature to dismiss the charges in this case based on speculation regarding what Congress may or may not do.” Ruling, P-002, ¶ 10.

g. On 24 July 2009, the defense submitted a request to the Convening Authority to withdraw the Charge of Material Support for Terrorism based on the Administration policy that material support is not a violation of the law of war and thus not triable by military commission. *See* Attachment A. On 31 July 2009, the Convening Authority denied the defense request, pointing out that the Administration had not specifically prohibited the prosecution from proceeding with material support charges, and that Congress had not yet adopted the Administration policy. The Convening Authority also stated that the defense has misinterpreted the statements of Mr. Johnson and Mr. Kris. *See* Attachment B.

h. On 5 August 2009, the defense submitted a request to the Secretary of Defense that the Charge against Mr. Kamin be withdrawn and dismissed based upon the Hon. Jeh Johnson’s congressional testimony that DoD policy opposed prosecution of material support for terrorism by a military commission because it is not an offense in violation of the law of war. *See* Attachment C. No response was received to the defense request.

i. On 10 September 2009, Mr. Johnson again stated on the record the DoD policy that “material support is [not] a law of war offense [triable by military commission]. That’s still our position.” *See* Lara Jakes, “*DOD Lawyer Hedges on Closing Gitmo by January*,” THE MIAMI HERALD, Sept. 10, 2009 (Attachment D).

j. On 11 September 2009, the defense submitted a second request to the Convening Authority requesting that the material support charge against Mr. Kamin be dismissed based upon Mr. Johnson's 10 September 2009 affirmation that DoD policy does not support the prosecution of material support in a military commission. *See* Attachment E. To date no response has been received from the Convening Authority.

k. On 16 September 2009, on the last day of the 120-day continuance previously granted by the Commission, the government filed P-003 and requested an additional 60-day continuance. Government Motion, P-003, 16 September 2009. This marks the government's third continuance request to this Commission and if granted would add 60 days to the 240 days already requested and granted in continuance time.

6. Discussion:

I. THE GOVERNMENT'S CLAIM THAT IT WILL BE READY TO PROCEED IN 60-DAYS IS FALSE.

a. The third government motion for a continuance, P-003, claims that the requested 60-day continuance is sufficient for the Administration to complete its review of Mr. Kamin's case and for Congress to act on pending military commission reform legislation. Neither assertion is accurate, and 60-days hence the government will be required to request yet another continuance while commission rules are being modified and revised commission charges are plotted.

b. Legislation amending the MCA has passed both the Senate and the House of Representatives and must be negotiated in conference before a final bill is voted upon by the Congress. Despite its irresponsible claim to the contrary, the government, broadly defined to include both the President and the detailed trial counsel for this case, has no way of predicting or holding Congress to a set schedule for passage of this bill, nor can it attest that the bill, a product of a political debate amongst the people's elected representatives, will *ever* be passed. Further, any MCA amendments would require rule changes in military commission practice and procedure that cannot be implemented by 16 November 2009, even if the bill were to reach the President's desk by early October 2009. The implementation will be further delayed due to the fact that a number of legal positions taken by the government in this case – above and beyond material support of terrorism – appear to be at odds with recent Administration position on law of war prosecutions, particularly on whether the Constitution governs this Commission,³ whether the basic jurisdiction for this Commission will continue to exist,⁴ and what rules of discovery will apply.⁵

³ The government in its Response to Defense Motion to Dismiss (D-012), fn. 2, pg. 5, asserts that constitutional decisions do not apply to an alien unlawful enemy combatant, such as the accused, tried before this Commission. Assistant Attorney General David Kris testified before the Senate Armed Services Committee on 7 July 2009 that Guantanamo detainees are entitled to due process (the due process clause is rooted in the Fifth Amendment).

⁴ Currently, Military Commissions Act ("MCA") Section 948c states that "any alien unlawful enemy combatant is subject to trial by military commission under this chapter." An alien unlawful enemy

c. Mr. Kamin bears the dubious distinction of being the sole charged defendant in the Commissions with a Charge of material support for terrorism and no other charged offenses.⁶ As the Administration policy stands that material support for terrorism is not a law of war offense, and the government cannot establish Commission jurisdiction without a law of war offense,⁷ it is certain that Mr. Kamin cannot stand trial before a military commission as currently charged because no fall-back Charge remains once the material support Charge is dismissed. The unique posture of Mr. Kamin's Commission case ensures that the government will not be prepared to proceed upon the expiration of the requested 60-day continuance. Even if Mr. Kamin remains before a Commission for prosecution (noting that the government states in its motion that he will not be prosecuted by an Article III Court, *see* P-002, ¶ 5.f), new charges constituting law of war offenses will have to be sworn and new rules implementing the Fiscal Year 2010 NDAA will have to be drafted and promulgated.

d. Finally, P-003 is contradictory on its face in its reasons for requesting the 60-day continuance. In his declaration, Hon. Jeh Johnson states, "[t]he Attorney General, after consultation with the Secretary of Defense, will decide, and this commission will be informed, within 60 days from 17 September 2009, whether the accused in this case will be prosecuted in federal court or by military commission..." Government Motion, P-003, Attachment A, ¶ 3. However, Paragraph 5(f) of P-003 states that "Mr. Kamin was not recommended for prosecution in an Article III court by the Guantanamo Review Task Force and, as such, is not being considered under this protocol." The very reason for the continuance in the Johnson affidavit is admitted in the government motion to be inapplicable to Mr. Kamin.

II. THE COMMISSION SHOULD INVOKE ITS INHERENT SUPERVISORY POWERS TO DISMISS THE CHARGES WITH PREJUDICE.

Combatant is defined in Section 1301, § 948a(1) of the MCA. § 948c of the proposed 2010 NDAA uses different language, stating that "any alien unprivileged enemy belligerent having engaged in hostilities or having supported hostilities against the United States is subject to trial by military commission as set forth in this chapter." As defined in § 948a(7) of the 2010 NDAA, unprivileged enemy belligerent is a term of art rooted in customary international law and different from the definition of alien unlawful enemy combatant.

⁵ Section 1301, § 949j includes a subsection that is not included in the MCA. It is titled, "disclosure of exculpatory evidence," and essentially codifies the requirements laid out in *Brady* which the government currently asserts does not apply in the present Commission. *See* Response to Defense Motion to Dismiss (D-012), fn. 2, pg. 5

⁶ Of the 24 Commission cases (preferred, referred, or post-trial) publicly listed on the Office of Military Commission website at <http://www.defenselink.mil/news/commissions.html>, only Mr. Kamin's case includes a material support charge without companion conspiracy or other charges.

⁷ "At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2780 (2006).

a. “The military commission was not born of a desire to dispense a more summary form of justice than is afforded by court-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter.” *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2792 (2006). At present, the government seeks to continue proceedings while it debates and decides whether it, in fact, has jurisdiction over Mr. Kamin. More brazen, the government requests the Commission to yet again sit idly by while it engages in this “review” while Mr. Kamin remains isolated in pretrial confinement.

b. In order to foster public confidence, it is vital that the military judges presiding over the commissions, like federal judges in Article III courts, be independent. *See Boumediene v. Bush*, 128 S.Ct. 2229, 2269 (2008)(“A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence.”). The government makes a mockery of this notion by pushing the military judge to acquiesce to its position while simultaneously lobbying the Congress that the charge is not viable to be prosecuted by military commission. Indeed, the government recognizes that it can at any time effectuate its desired outcome by simply withdrawing the charges. *See* Government Motion, P-002, Action Memo for the Secretary of Defense from Jeh Johnson, Attachment D (“if the motions for continuance are denied, we will have to withdraw the referred cases to comply with the terms of the Executive Order.”).

c. Subsequent to the Commission Ruling on P-002, the defense has alerted both the Convening Authority and the Secretary of Defense that it unconscionably continues a sham prosecution when it acknowledges that the offense can not be prosecuted in this forum. Both declined to take action and cited, as did the Commission in its Ruling on P-002, that the change to the MCA was purely speculative as to whether material support will be stripped from the MCA. However, there are only two possible outcomes to consider – either material support will be included once the MCA is amended or it will not be included. If it is not, the case will be dismissed. If it is, the government will still be rooted in the problem that to proceed would require uniformed military prosecutors, employees of the Department of Defense, to proceed in charging and making arguments that are in direct conflict with official Department policy. In either scenario, the “interests of justice” require that the Commission no longer permit the government to taunt it with promises of a decision to come, all the while Mr. Kamin remains in pretrial confinement in his cell in Guantanamo Bay.

d. A court may dismiss an indictment on the ground of outrageous government conduct if the conduct amounts to a due process violation. If, however, the conduct does not amount to a due process violation, the court may nonetheless dismiss under its supervisory powers. *See United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008); *quoting United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991). A court may exercise its supervisory powers to deter future illegal conduct. *See Id.* at 1085; *quoting United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991). The Commission should use its inherent supervisory power to levy the ultimate sanction on the United States by dismissing the Charge with prejudice.

e. The Military Judge shall exercise reasonable control over the proceedings to promote the purposes of the Rules for Military Commissions and the Manual for Military Commissions. *See* R.M.C. 801(a)(3). Included within the responsibility and authority of the Military Judge is a judicial power to abate the proceedings. *See United States v. Pruner*, 33 M.J. 272, 276 (C.M.A. 1991)(determining the procedure of the military judge to review *in camera* whether a denial of a security clearance to a defense counsel was arbitrary or unsupported by law and, upon such findings, take remedial action, including abatement). The government cites the “interests of justice, as well as the national security and foreign policy interests of the United States” as a basis for its request. Yet, this court, in exercising reasonable control over the proceedings, should take no account of “national security and foreign policy interests,” whatever those terms may mean in this context. Rather, the Commission must be concerned with the judicial interests of ensuring that the trial before it is just and fair.

f. “In determining whether to dismiss charges with or without prejudice, the military judge shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a prompt trial under this rule.” R.M.C. 707(d)(1). This analysis dictates dismissal with prejudice. First, the alleged acts must be an offense to be deemed serious – it is not. The facts and circumstances discussed herein detail the audacious acts of the government that merit a drastic remedy. The third factor, the “administration of justice” is what this Commission must protect first and foremost, and impact of a re-prosecution would permit the government to suffer no consequences for its outrageous conduct in this case. Finally, the Commission must account for the prejudice that further delays have upon a man who has been confined in U.S. custody for 2,325 days awaiting a just resolution of his case. The only just remedy on this motion is for the Commission to assert its inherent supervisory powers to ensure that the rights of no man accused, even one alleged to be an “alien unlawful enemy combatant” be so carelessly discarded by the government.

7. Request for Oral Argument: As it is entitled, the defense respectfully requests oral argument. *See* R.M.C. 905(h). Specifically, the defense respectfully requests the Commission schedule a hearing on Wednesday, 7 October 2009 wherein the parties will have an opportunity to present evidence and argument on P-003.

8. Witness Request: The Hon. Jeh Johnson, General Counsel of the Department of Defense (contact information purposefully omitted). Mr. Johnson can testify regarding whether Mr. Kamin is being considered for prosecution before an Article III court, thus clarifying the contradiction between his affidavit and the government motion, which is relevant to the Commission’s findings on the present motion. Additionally, Mr. Johnson can testify regarding the DoD’s position that material support is not a viable offense to be charged before a military commission because it is not a law of war offense, and whether he will permit military prosecutors to go forward on this offense if and when Congress ignores the Executive’s efforts to strip this offense from the amended MCA.

9. **Additional Information:** "The Military Judge has the sole authority to determine whether or not any given matter shall be released." *See* RC 3.9.c; *see also* R.M.C. 801; Reg. ¶¶ 19-5, 19-6. The Commission should seek to strike a balance of protecting Mr. Kamin's right to a fair trial, the improper or unwarranted publicity pertaining to the case, and the public understanding of the Military Commissions. *See* Reg. ¶ 19-1. The release of pleadings and rulings is essential for the public, writ large, to be able to assess and evaluate the legitimacy of United States judicial proceedings being held on a military base overseas and in a fortified courtroom. At a minimum, providing the public the opportunity to read and evaluate the pleadings and rulings would contribute to Mr. Kamin being able to have a "public trial." *See* U.S. Constitution, Sixth Amendment. This is especially true of the present motion as the sole basis for the continuance sought by the government is the "interests of justice." The defense hereby respectfully requests that the Military Judge authorize the Assistant Secretary of Defense for Public Affairs (or designee) to release this pleading and any and all responses, replies, and/or rulings under the same designation to the public at the earliest possible date.

10. **Attachments:**

- A. 24 July 2009 Defense Request to the Convening Authority
- B. 31 July 2009 Convening Authority Response to the Defense
- C. 5 August 2009 Defense Request to the Secretary of Defense
- D. 10 September 2009 Testimony of the Hon. Jeh Johnson before the American Bar Association, as reported in Lara Jakes, "*DOD Lawyer Hedges on Closing Gitmo by January*," THE MIAMI HERALD, Sept. 10, 2009.
- E. 11 September 2009 Defense Request to the Convening Authority

Respectfully submitted,

By: Clay M. West
for LCDR RICHARD E.N. FEDERICO, JAGC, USN
CPT CLAY M. WEST, JA, USAR
*Detailed Defense Counsel for
Mohammed Kamin*

Office of the Chief Defense Counsel
Office of Military Commissions

[REDACTED]

ATTACHMENT A



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

24 July 2009

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Request for Withdrawal and Dismissal of Charges in case of *United States v. Mohammed Kamin*

1. On 24 July 2009, the Military Judge granted the Government's Motion for an additional 120-day continuance of the above titled-case. *See* Ruling P-002. During oral argument on this motion, detailed defense counsel requested the Military Judge order the charges withdrawn and dismissed with prejudice. Though the Commission declined to issue such an order, the defense respectfully requests your consideration to withdraw and dismiss the charges in the interests of justice, with or without prejudice.¹
2. Mr. Kamin is charged with one offense – Providing Material Support for Terrorism – supported by six specifications. You referred the charge for trial by military commission on 21 May 2008. Material support was codified as a law of war offense by the Congress in October 2006 with the passage of the Military Commissions Act of 2006 ("MCA"). 10 U.S.C. § 950v(b)(25). This offense is similar to ones found in the U.S. Code as offenses to be tried in U.S. District Courts. *See* 18 U.S.C. §§ 2339A, 2339B.
3. From the inception of the MCA, there has been legitimate debate over whether material support is a traditional violation of the law of war and, thus an offense properly tried by military commission. To date, this question has only been litigated in one military commission case, *United States v. Salim Hamdan*, and the Military Judge's ruling was in favor of the Government.²
4. Following the issuance of an Executive Order to "halt" military commission proceedings, the President made clear that military commissions are an appropriate venue solely to be used to try detainees accused of violating the laws of war. *See* President Barack Obama, "Protecting Our Security and Our Values," Address at the National Archives Museum (May 21, 2009); *see also* Detention Policy Task Force, Memorandum for the Attorney General and the Secretary of Defense (Jul. 20, 2009). In the last six months, the Administration has been engaging in a review of the laws and procedures for trial by military commission. Recently, Congress has been debating and voting on amending the MCA.

¹ Detailed defense counsel submit this request solely under the authority provided by the Commission on 21 May 2008 that detailed defense counsel shall represent the accused in this case and engage in the discovery process. The Commission ordered detailed defense counsel to represent Mr. Kamin because "the statute requires it" and because "discovery issues and all of the information that would be necessary for you to get your defense rolling." *See Transcript of Hearing ICO United States v. Kamin*, May 21, 2008 (Draft), pg. 42. CPT West was detailed to the case on 29 January 2009.

² The members in that case convicted Mr. Hamdan only of material support, acquitting him of the conspiracy charge. An appellate court has not yet had the opportunity to review the Military Judge's ruling regarding material support as Mr. Hamdan's appeal has not yet been filed.

SUBJECT: Request for Withdrawal and Dismissal of Charges in case of *United States v. Mohammed Kamin*

5. On 7 July 2009, the Administration announced its conclusion that material support is not a traditional violation of the law of war and thus should not be an offense triable by military commission. This was done by the Hon. Jeh Johnson, General Counsel, Department of Defense, during his testimony before the Senate Armed Services Committee. Mr. Johnson stated in his written remarks that he was “speaking on behalf of the administration” and that:

After careful study, the Administration has concluded that appellate courts may find that “material support for terrorism” – an offense that is also found in Title 18 – is not a traditional violation of the law of war. As you know, the President has made clear that military commissions are for law of war offenses. We thus believe it would be best for material support to be removed from the list of offenses triable by military commission.

6. This view was echoed by Mr. David Kris, Assistant Attorney General (Head of the National Security Division), U.S. Department of Justice, who stated as follows in his written remarks to the Senate Armed Services Committee:

There are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a *significant risk* that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby reversing hard-won convictions, and leading to questions about the system’s legitimacy. (emphasis added).

7. On 24 July 2009, Mr. Kris again confirmed the Justice Department’s conclusion that material support is not a violation of the law of war, while again lobbying Congress to remove this offense from the statute when it amends the MCA. During testimony before the House Armed Services Committee, Mr. Kris included the near-identical remarks that he provided to the Senate, however he strengthened the emphasis by changing one word:

There are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a *significant likelihood* that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby threatening to reverse hard-won convictions and leading to questions about the system’s legitimacy. (emphasis added)

8. As a result of the Government reaching this conclusion, it is certain that Mr. Kamin cannot stand trial before a military commission as currently charged. Even if Congress disregarded the Administration’s conclusion and ultimately keeps material support in the MCA after it is amended in the National Defense Authorization Act for Fiscal Year 2010, no lawyer representing the United States could ethically prosecute this offense before a military commission. To do so under these circumstances would not only violate several Rules of

SUBJECT: Request for Withdrawal and Dismissal of Charges in case of *United States v. Mohammed Kamin*

Professional Responsibility,³ it would also certainly tarnish the military commission as a legitimate forum to prosecute law of war violations.

9. As the official specifically designated by the Secretary of Defense to dispose of charges in this forum, you have the authority to withdraw and dismiss the charges. See R.M.C. 401, 407(a). We respectfully urge you to immediately exercise your authority and promptly take action on this request to avoid further delaying the inevitable regarding these charges. It is unethical, immoral, and unjust to allow this case to sit idle with charges pending when the ultimate result is known, yet is not being executed by the Government. Any additional forward movement on this case, under these circumstances, is unjust and inefficient.

10. Thank you for your consideration of this request. In order to ensure a prompt and just resolution to this issue, we stand by to provide any additional information or answer any questions. We may be reached at: (LT Federico) – [REDACTED]; [REDACTED]; (CPT West) – [REDACTED]; [REDACTED]

Respectfully Submitted,

By: Richard E.N. Federico

LT Richard E.N. Federico, JAGC, USN
Detailed Defense Counsel for
Mr. Mohammed Kamin

By: Clay M. West

CPT Clay M. West, JA, USAR
Detailed Defense Counsel for
Mr. Mohammed Kamin

³ See, e.g. Model Rule of Professional Responsibility, Rule 3.1 ("Meritorious Claims and Contentions"), Rule 3.3 ("Candor Toward the Tribunal"), Rule 3.8 ("Special Responsibilities of a Prosecutor").

ATTACHMENT B



OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

31 July 2009

MEMORANDUM FOR LCDR Richard E. N. Federico, USN, Defense Counsel, OMC
Capt Clay M. West, USAR, Assistant Defense Counsel, OMC

SUBJECT: *U.S. v. Kamin*; Response to Request to Withdraw or Dismiss the Charges

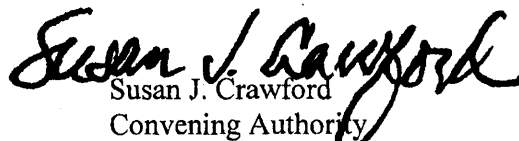
I considered carefully your letter of 24 July 2009 requesting that I withdraw or dismiss the charges currently pending against your client, Mohammed Kamin. The request is denied.

In the letter you rely on recent statements of the General Counsel of the Department of Defense and the Assistant Attorney General for National Security to Senate and House committees considering amendments to the Military Commissions Act to support your position that the Government cannot go forward on the charges currently pending against Mr. Kamin. I disagree. The General Counsel, Mr. Johnson, said the Administration has concluded that *appellate courts may find that material support for terrorism is not a traditional violation of the law of war*. Mr. Kris of the Department of Justice said *the administration believes there is a significant risk that a conviction for one or both of these offenses could be reversed on appeal*. These statements were made to support their recommendation to the committees that the Material Support offenses be removed from the Military Commissions Act (MCA). Neither official said the Government may not go forward on material support charges and, to date, Congress has not adopted this recommendation.

When it enacted the Military Commissions Act, the Congress asserted that “(t)he provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.” In light of Congress’s enumerated power under Article I, Section 8, Clause 10 of the Constitution to define and punish offenses against the law of nations, and its express declaration that in doing so it has not enacted “new crimes that did not exist before its enactment” it is apparent that the Congress does consider these to be violations of the Laws of War.

One court has considered the validity of Material Support charges. The judge in the military commission trial of Salim Hamdan ruled on a defense motion to dismiss a charge of Providing Material Support for Terrorism. He denied the defense motion, finding that the conduct embraced within the specification included conduct which the United States has considered a violation of the law of war at least since the Civil War. Judge Allred deferred to Congress’s determination that Material Support for Terrorism is not a new offense and ruled that there is an adequate historical basis for the charges.

I do not agree that "(i)t is certain that Mr. Kamin cannot stand trial before a military commission as currently charged." Material Support for Terrorism is an enumerated, codified offense under the MCA. I strongly disagree with you that "no lawyer could ethically prosecute this offense before a military commission," or that "to do so would violate several Rules of Professional Responsibility." Mr. Johnson's and Mr. Kris's statements reflect their concern that a charge of Providing Material Support for Terrorism or a Terrorist Organization may not withstand appellate scrutiny. The only tribunal that has considered the validity of material support charges to date upheld them. It is reasonable to proceed with material support charges in military commissions unless or until Congress removes the offenses from the Military Commissions Act or an appellate court rules in an appropriate case that the offenses are not violations of the law of war and thus may not be tried by military commission.


Susan J. Crawford
Convening Authority
for Military Commissions

ATTACHMENT C



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

5 August 2009

MEMORANDUM FOR THE SECRETARY OF DEFENSE

SUBJECT: Request for Withdrawal and Dismissal of Charges in the case of *United States v. Mohammed Kamin*

Encl: (1) Commission Ruling, P-002, 23 July 2009
(2) Memorandum for the Convening Authority from Defense Counsel, 24 July 2009
(3) Memorandum for Defense Counsel from the Convening Authority, 31 July 2009

1. Mr. Mohammed Kamin (ISN 1045) is an Afghan who has been incarcerated in Guantanamo Bay, Cuba since September 2004. On 23 July 2009, the Military Judge granted the Government's Motion for an additional 120-day continuance of his case. See Enclosure (1). On 31 July 2009, the Convening Authority denied a defense request for the charges to be withdrawn and dismissed, with or without prejudice. See Enclosures (2) and (3). In the interests of justice, the defense respectfully requests you exercise your authority and order forthwith the charges withdrawn and dismissed, with or without prejudice.¹

2. "At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2780 (2006). Mr. Kamin is charged with one offense – Providing Material Support for Terrorism – supported by six specifications. The charges against Mr. Kamin must be withdrawn and dismissed because material support cannot be prosecuted by military commission as it is **not** an offense in violation of the law of war. This conclusion is not one solely reached by counsel detailed to represent Mr. Kamin; rather it is the conclusion shared by the Department of Defense (DoD) Office of the General Counsel and the U.S. Department of Justice (DoJ).

3. Material support was codified as a law of war offense by the Congress in October 2006 with the passage of the Military Commissions Act of 2006 ("MCA"). 10 U.S.C. § 950v(b)(25). This offense is similar to ones found in the U.S. Code as offenses to be tried in U.S. District Courts. See 18 U.S.C. §§ 2339A, 2339B. From the inception of the MCA, there has been legitimate debate over whether material support is a traditional violation of the law of war and, thus an offense properly tried by military commission. To date, this question has only been

¹ Detailed defense counsel submit this request solely under the authority provided by the Commission on 21 May 2008 that detailed defense counsel shall represent the accused in this case and engage in the discovery process. The Commission ordered detailed defense counsel to represent Mr. Kamin because "the statute requires it" and because "discovery issues and all of the information that would be necessary for you to get your defense rolling." See *Transcript of Hearing ICO United States v. Mohammed Kamin*, May 21, 2008 (Draft), pg. 42. CPT West was detailed to the case on 29 January 2009.

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litigated in one military commission case, *United States v. Salim Hamdan*, and the Military Judge's ruling was in favor of the Government.²

4. Following the issuance of an Executive Order to "halt" military commission proceedings, the President made clear that military commissions are an appropriate venue solely to be used to try detainees accused of violating the laws of war. See President Barack Obama, "Protecting Our Security and Our Values," Address at the National Archives Museum (May 21, 2009); see also Detention Policy Task Force, Memorandum for the Attorney General and the Secretary of Defense (Jul. 20, 2009) ("Policy TF Memo"). In the last seven months, the Administration has been engaging in a review of the laws and procedures for trial by military commission. Recently, Congress has been debating and voting on amending the MCA, with amendments likely to be included within the National Defense Authorization Act for FY10 (NDAA).

5. During this review and debate, the Hon. Jeh Johnson, DoD General Counsel, has testified before Congress on several occasions, along with Mr. David Kris, Assistant Attorney General, DoJ National Security Division. They have both stated the Administration's conclusion that material support is not an offense in violation of the law of war.

6. On 7 July 2009, Mr. Johnson stated in his written remarks that he was "speaking on behalf of the administration" during his testimony before the Senate Armed Services Committee (SASC) and that:

After careful study, the Administration has concluded that appellate courts may find that "material support for terrorism" – an offense that is also found in Title 18 – is not a traditional violation of the law of war. As you know, the President has made clear that military commissions are for law of war offenses. We thus believe it would be best for material support to be removed from the list of offenses triable by military commission.

7. This view was echoed by Mr. Kris, who stated as follows in his written remarks to the SASC:

There are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a *significant risk* that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby reversing hard-won convictions, and leading to questions about the system's legitimacy. (emphasis added).

8. On 24 July 2009, Mr. Johnson appeared before the House Armed Services Committee (HASC) and stated, "[w]e looked at it carefully and concluded the historical precedent for

² The members in that case convicted Mr. Hamdan only of material support, acquitting him of the conspiracy charge. An appellate court has not yet had the opportunity to review the Military Judge's ruling regarding material support as Mr. Hamdan's appeal has not yet been filed.

SUBJECT: Request for Withdrawal and Dismissal of Charges in the case of *United States v. Mohammed Kamin*

Material Support for Terrorism as a law of war offense was questionable and therefore Material Support should be prosecuted, if it is prosecuted, in Article III Courts.”

9. During testimony before the HASC on 24 July, Mr. Kris again confirmed the Justice Department’s conclusion that material support is not a violation of the law of war, while again lobbying Congress to remove this offense from the statute when it amends the MCA. Mr. Kris included the near-identical remarks that he provided to the Senate, however he strengthen the emphasis by changing one word:

There are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a *significant likelihood* that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby threatening to reverse hard-won convictions and leading to questions about the system’s legitimacy.
(emphasis added)

10. In denying the defense request to withdraw and dismiss the charges, Judge Crawford responded to the testimony of Mr. Johnson and Mr. Kris, by stating as follows: “[n]either official said the Government cannot go forward on material support charges and, to date, Congress has not adopted these recommendations.” It must be presumed that when Mr. Johnson and Mr. Kris testified before the Congress, the recommendations they put forward “on behalf of the Administration” were based upon a thorough legal analysis. The dismissal of these public statements by Judge Crawford mischaracterizes and grossly understates the Administration’s position. In fact, the officials are saying exactly what Judge Crawford says they are not – the Government cannot go forward on material support charges in a military commission because it would be in violation of both Supreme Court precedent and the President’s order.

11. Even if Congress disregarded the Administration’s conclusion and ultimately keeps material support in the MCA after it is amended in the NDAA, no lawyer representing the United States could ethically prosecute this offense before a military commission. To do so under these circumstances would not only violate several Rules of Professional Responsibility,³ it would also certainly tarnish the military commission as a legitimate forum to prosecute law of war violations.

12. The President has pledged to work with Congress to reform military commissions to make them a “fair, legitimate, and effective” venue for trying detainees for offenses in violations of the law of war. Though this review remains ongoing, the commissions as they currently exist have ubiquitously been acknowledged to fall well short of this goal. As the Detention Policy Task Force acknowledged, “[d]espite the benefit of Congressional involvement, the commissions still suffered from a perceived lack of legitimacy.” Policy TF Memo, pg. 2. This view was also stated by Mr. Johnson before the HASC, “[m]ilitary commissions can and should contribute to our national security by *becoming* a viable forum for trying those who violate the law of war.”

³ See, e.g., Model Rule of Professional Responsibility, Rule 3.1 (“Meritorious Claims and Contentions”), Rule 3.3 (“Candor Toward the Tribunal”), Rule 3.8 (“Special Responsibilities of a Prosecutor”).


SUBJECT: Request for Withdrawal and Dismissal of Charges in the case of *United States v. Mohammed Kamin*


13. It is our belief that nothing short of the legitimacy of the military commissions is at stake in this request. Despite the fact that Mr. Kamin is not a "high value detainee," nor a case of elevated public interest, his rights must be vigorously protected and enforced the same as all other persons who face criminal charges. You have the authority to withdraw and dismiss the charges. See R.M.C. 401. We respectfully urge you to immediately exercise your authority and promptly take action on this request to avoid further delaying the inevitable regarding these charges. Any additional forward movement on this case, under these circumstances, is unjust and inefficient.

14. Mr. Kamin suffers prejudice and irreparable harm by the charges remaining pending. Despite the fact that the Guantanamo Review Task Force stated that it would give priority in its review to those detainees with charges pending, we do not believe that Mr. Kamin's case has even been scheduled for a "vote" on the recommendations of the Task Force or the Review Panel.⁴ Undoubtedly, the fact that he has charges pending reduces the likelihood that his case will be thoroughly reviewed and considered for transfer and release. Indeed, the protocol governing cases referred for possible prosecution includes "any pending charges" as a factor to be considered. See Policy TF Memo, Tab A, ¶ 2.A.

15. "While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody." *Boumediene v. Bush*, 128 S.Ct. 2229, 2275 (2008). In furtherance of an expeditious review of this matter, as required by the U.S. Supreme Court, and, if denied, to ensure the defense will have adequate time to seek relief in other forums at the earliest possible date, **we respectfully request that a response be provided no later than Monday, 17 August 2009.** We will treat a failure to respond by that date as a denial of this request.

16. We invite any questions or requests for additional information. We may be reached at: (LCDR Federico) - [REDACTED]; [REDACTED] (CPT West) - [REDACTED]
[REDACTED]

By: 
LCDR Richard E.N. Federico, JAGC, USN
Detailed Defense Counsel for
Mr. Mohammed Kamin

By: 
CPT Clay M. West, JA, USAR
Detailed Defense Counsel for
Mr. Mohammed Kamin

Cc:
Hon. Jeh Johnson, DoD General Counsel

⁴ This assertion is based upon our review of the Panel Vote Matrix and may be easily verified by the Task Force or Review Panel.

ATTACHMENT D

The Miami Herald

Posted on Thu, Sep. 10, 2009

DOD lawyer hedges on closing Gitmo by January

By LARA JAKES
Associated Press Writer

The Pentagon's top lawyer on Thursday said the Obama administration remains committed to closing the Guantanamo Bay prison by early next year but stopped short of assuring it will happen.

Pentagon general counsel Jeh Johnson's comments came as Congress weighs how to revamp a military court system - a key part of President Barack Obama's pledge to close Guantanamo by Jan. 22.

A number of legal questions remain on how to prosecute and detain the 226 suspected al-Qaida, Taliban and foreign fighters currently held at the U.S. military prison in Cuba. That has cast doubt on whether the Obama administration can resolve the questions in just over four months, and prompted top Republicans in Congress to demand that the prison stay open for now.

Johnson told a national security panel of American Bar Association lawyers that there are many issues involved in closing Guantanamo Bay and transferring detainees elsewhere.

"But we all remain committed to doing this, and we remain committed to doing this on the deadline that the president set," Johnson said. "But there are many challenges."

Underscoring those challenges, Johnson also said he hoped that legislation to overhaul the Bush-era military commissions court system would be completed by the end of this month.

In brief remarks to The Associated Press, Johnson cautioned that administration lawyers are still at odds with a Senate plan that defines providing material support to terrorists as a war crime.

Material support is a federal crime, but the charge was elevated to a laws of war violation in the 2006 Military Commissions Act pushed by then-President George W. Bush. The issue is important because it will determine what kind of court some of the Guantanamo detainees will be tried in. The government wants to resolve it before deciding to which U.S. prisons the detainees can be moved.

"We don't believe that material support is a law of war offense," Johnson said. "That's still our position. Material support is still in the bill. Don't know how that's going to end up."

Meanwhile, the government faces a deadline next Thursday to continue with several key military commissions cases that have been on hold while the administration continues to work on revising the commissions law and closing the detention center. Pentagon lawyers

could simply ask for another extension and keep the cases on hold.

Speaking on the eve of the Sept. 11, 2001, attacks, Johnson described the administration's struggle to follow legal and moral guidelines when dealing with terror detainees while protecting America from al-Qaida.

Ultimately, he said, the government must ensure that U.S. laws follow what he called American values that do not allow cruel or degrading treatment of detainees - and that military troops and interrogators alike clearly understand those rules.

"There are no easy answers to the questions that we face," Johnson said. "But I'd like you all to be patient with us. We are doing our best."

Associated Press Writer Devlin Barrett in Washington contributed to this report.

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ATTACHMENT E



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

11 September 2009

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Second Request for Withdrawal and Dismissal of Charges in case of
United States v. Mohammed Kamin

Ref: (a) Memorandum for LCDR Federico and Capt West, Subj: *U.S. v. Kamin*: Response
to Request to Withdraw and Dismiss the Charges, dated 31 July 2009

Encl: (1) Lara Jakes, "DOD Lawyer Hedges on Closing Gitmo by January," The Miami
Herald, Sept. 10, 2009

1. In reference (a), you denied a defense request to withdraw and dismiss the charges against Mr. Kamin. The original request was premised upon the July 2009 testimony before Congress of senior representatives of the Departments of Defense and Justice that Material Support for Terrorism, the only charge levied against Mr. Kamin, is not a law of war offense. In the interests of justice, fundamental fairness, and judicial economy, the defense respectfully requests you reconsider your prior conclusion and withdraw and dismiss the charge against Mr. Kamin.¹

2. On 10 September 2009, the Hon. Jeh Johnson reaffirmed and solidified the executive branch's position regarding material support by stating to the national security panel of the American Bar Association, "[w]e don't believe that material support is a law of war offense. That's still our position." See Lara Jakes, "DOD Lawyer Hedges on Closing Gitmo by January," The Miami Herald, Sept. 10, 2009 (Enclosure 1). There is no doubt or ambiguity that the official position of the Department of Defense is that material support is not a violation of the law of war.² Thus the Government cannot establish jurisdiction in this case because, "[a]t a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2780 (2006).

3. In your denial, reference (a), you stated your conclusion that "it is reasonable to proceed with material support charges in military commissions unless or until Congress removes the offense from the Military Commissions Act or an appellate court rules in an appropriate case that the offenses are not violations of the law of war." The defense respectfully disagrees with this conclusion. The scenario you propose envisions uniformed military prosecutors, employees of

¹ Detailed defense counsel submit this request solely under the authority provided by the Commission on 21 May 2008 that detailed defense counsel shall represent the accused in this case and engage in the discovery process. The Commission ordered detailed defense counsel to represent Mr. Kamin because "the statute requires it." See *Transcript of Hearing ICO United States v. Kamin*, May 21, 2008 (Draft), pg. 42. CPT West was detailed to the case on 29 January 2009.

² Lest there be any doubt about this position, we respectfully encourage you to consult with the Department of Defense, Office of General Counsel, included as a "copy to" in this memorandum.

SUBJECT: Second Request for Withdrawal and Dismissal of Charges in case of
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the Department of Defense, making arguments that are in direct conflict with official Department policy. These arguments may also conflict with the ethical rules binding military commission prosecutors.³ This is so whether or not Congress chooses to strip material support from the Military Commissions Act, as to be amended by the National Defense Authorization Act for FY10.

4. This case is scheduled to resume on 17 September 2009, the date the previous continuance expires. *See* Ruling, P-002, dated 24 July 2009. Permitting this case to proceed under the present circumstances would further tarnish the military commission system, already perceived by many as an illegitimate forum to prosecute law of war violations. As the official specifically designated by the Secretary of Defense to dispose of charges in this forum, you have the authority to withdraw and dismiss the charges. *See* R.M.C. 401, 407(a). We respectfully urge you to immediately exercise your authority and promptly take action on this request. Any additional forward movement on this case, under these circumstances, is unjust.

5. Thank you for your consideration of this request. In order to ensure a prompt and just resolution to this issue, we stand by to provide any additional information or answer any questions. We may be reached at: (LCDR Federico) – [REDACTED];
[REDACTED]; (CPT West) – [REDACTED]

Respectfully Submitted,

By: Richard E.N. Federico

LCDR Richard E.N. Federico, JAGC, USN
Detailed Defense Counsel for
Mr. Mohammed Kamin

By: Clay M. West

CPT Clay M. West, JA, USAR
Detailed Defense Counsel for
Mr. Mohammed Kamin

Copy to:
Hon. Jeh Johnson, DoD General Counsel
(via LCDR James Mills, JAGC, USN, Military Assistant)

³ *See, e.g.* Model Rule of Professional Responsibility, Rule 3.1 ("Meritorious Claims and Contentions"), Rule 3.3 ("Candor Toward the Tribunal"), Rule 3.8 ("Special Responsibilities of a Prosecutor").

UNITED STATES OF AMERICA)

v.)

MOHAMMED KAMIN)

**GOVERNMENT REPLY
TO DEFENSE RESPONSE TO
P-003**

Government Motion For
Appropriate Relief

28 September 2009

1. Timeliness. This reply motion is filed in accordance with the timelines specified by R.M.C. 905(b)(4) and the Military Commissions Trial Judiciary Rules of Court.

2. Reply. In the interests of justice, the Government filed a motion respectfully requesting the Military Commission grant an additional 60-day continuance of the proceedings in the above-captioned case until 16 November 2009.¹ The Defense has responded to the Government's motion, and requests the commission to abate the proceedings and dismiss the case with prejudice. The Government disagrees, and respectfully requests the Military Commission grant an additional 60-day continuance because it is in the best interest for both parties. Additionally, the Defense's renewed motion to abate or dismiss the proceedings with prejudice should be denied.

a. By no later than 16 November 2009, the Guantanamo Review Task Force will complete its review of Kamin's case, and the Attorney General, in consultation with the Secretary of Defense, will make a final decision whether the Government will continue to prosecute Kamin before this commission or pursue some other alternative. Also, Congress is close to amending the Military Commissions Act of 2006, and it is anticipated that these changes to the Act will be to the benefit of the Accused.

b. On 7 July 2009, Defense filed a motion requesting the Military Commission order a new inquiry into the mental health of the Accused. See D-027. The Military Commission agreed on 15 July 2009 to order a new inquiry into the mental health of Mr. Kamin, and on 24 August 2009 entered an Order to this effect. Because the Defense expert's terms of access to Mr. Kamin in the commission's order is derivative of the sanity board's access, Defense counsel proposed a revised draft order to D-027 on 31 August 2009. See D-027 Second Supplement to Defense Motion Requesting the Military Commission Order a New Inquiry into the Mental Health of the Accused. The Defense requested the commission defer the original Commission Order (paragraphs 2(a) and 2(b)) suspense dates of 21 September and 28 September 2009 to 2 November 2009 for the summarized report, and 9 November 2009 for the full report. The Government did not oppose this request.

c. Because Defense counsel are asking for a delay in proceedings until the second 706 sanity report is completed on 9 November 2009, the Government is, in effect,

¹ The Government is seeking similar continuances in the other cases pending before military commissions.

requesting only seven additional days of delay - until 16 November 2009. The additional seven days are to allow for a final forum decision by the Attorney General and the passage of a new Military Commissions Act that will benefit the Accused.

d. The interests of justice served by granting the additional seven-day continuance outweigh the interests of both the public and the Accused in immediately proceeding forward. The review of the detainees' status and the pending legislative amendments to the MCA may result in changes that will (1) necessitate re-litigation of issues in this case or (2) produce legal consequences affecting the options available to both the Accused and the Government. It would be inefficient and potentially unjust to deny the requested continuance when the MCA is currently being reformed by the Congress and before the Guantanamo Review Task Force has completed its review and made a prosecutorial or other disposition decision regarding the Accused. Therefore, it is in the interests of justice for the Military Judge to grant one further continuance until 16 November 2009.

e. Moreover, because Congress has already established Providing Material Support for Terrorism as a law of war offense, the Defense's repeated request to dismiss the charge and specifications based on a statement from DOD General Counsel Mr. Jeh Johnson, should be denied again. The Defense fails to allege any significant facts or evidence substantially different than that raised in their oral motion at the commission's last hearing. In Mr. Johnson's 10 September 2009 statement to the Associated Press, he acknowledges that material support remains in the bill presently before Congress, and that it may remain in the final version of the bill. In fact, the possibility that MCA reforms may not include material support for terrorism is an additional reason for the commission to grant the Government's motion.

f. The Government's Motion for Appropriate Relief requesting a 60-day continuance did not contradict Mr. Johnson's declaration on the status of Mr. Kamin's case before the Guantanamo Review Task Force. The Defense's response incorrectly seizes on the Government's candid representation to the commission that the Task Force did not recommend Mr. Kamin's case for prosecution in an Article III court, arguing that the Government's motion is "contradictory on its face." However, the Defense resolves this purported contradiction itself later in that same paragraph. Defense counsel correctly quotes from Mr. Johnson's affidavit that "[t]he Attorney General, after consultation with the Secretary of Defense, will decide, and this commission will be informed, within 60 days from 17 September 2009, whether the accused in this case will be prosecuted in federal court or by military commission..." Government Motion, P-003, Attachment A, ¶ A. Thus, although the Guantanamo Review Task Force recommended against prosecuting Mr. Kamin in an Article III court, it is just a recommendation, and the Attorney General, in consultation with the Secretary of Defense, must still approve or disapprove this recommendation, something that will be done within 60 days from 17 September 2009.

g. Because the Defense cannot articulate any new facts supporting their latest request to abate the proceedings and dismiss the charge and specifications with prejudice,

they rely on hyperbole and accuse the Government of “outrageous conduct” without identifying the actions that constitute “outrageous conduct.” And given that the law establishing this commission remains the same as it did when the commission heard the Defense’s previous motion, the Government argues that the military judge’s ruling in P-002, that “it would be premature to dismiss the charges in this case based on speculation regarding what Congress may or may not do” still holds true.

h. Even a cursory analysis of the factors listed in Rule for Military Commission (R.M.C.) 707(d)(1) for the military judge to consider when determining whether to dismiss a charge with or without prejudice does not lead to the drastic remedy proposed by the Defense.² The Government strongly disagrees with the Defense’s blithe assertion that Mr. Kamin’s alleged acts cannot be deemed serious. The Convening Authority found that probable cause existed to prosecute Mr. Kamin before a military commission on six specifications of Providing Material Support for Terrorism under 10 USC §950(v)(25). He stands accused of transporting a GPS and weapons, storing mines, and trying to attack United States and Coalition forces. These are serious allegations for which Mr. Kamin faces a maximum sentence of life in prison.

i. Finally, Mr. Kamin will not be prejudiced by an additional continuance in this case. While Mr. Kamin has been detained at Guantanamo Bay since 2004, he has neither demanded a speedy trial nor attended any hearing, other than his arraignment which he was forced to attend, in this military commission. Meanwhile, Congress appears poised to pass changes to military commissions which, if signed into law by the president, will inure to Mr. Kamin’s benefit. Therefore, the interests of justice, as well as the interests of both Mr. Kamin and the public, will be best served by granting the Government’s requested continuance.


3. Reply to Defense’s Witness Request. The Government has denied the Defense’s Witness Request. Pursuant to R.M.C. 703(b)(1) and (c)(2)(D), Mr. Johnson’s testimony is neither relevant nor necessary to the Government motion for a continuance, or the Defense’s renewed motion to dismiss. Mr. Johnson’s testimony would reflect his opinion and/or the recommendation he provided to Congress, and is not relevant to whether the charged offense is valid under the current law and would, like the Defense argument, rely on conjecture, suppositions, and personal opinions - not the law. Questions of law are the province of the judge and not subject to the opinion testimony of a witness. Whether Mr. Johnson, or anyone else, believes Material Support to Terrorism is a Law of War offense is irrelevant to the proceedings until there is a change in the law.

4. Conclusion. For the foregoing reasons, the Military Commission should extend the previously granted continuance of further proceedings in the above-captioned case until 16 November 2009 and should adopt the Findings of Fact, Conclusions of Law, and

² R.M.C. 707(d)(1) provides in part that “[i]n determining whether to dismiss charges with or without prejudice, the military judge shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a prompt trial under this rule.”

Order submitted in P-003. Additionally, this delay should be excluded when determining whether any period under R.M.C. 707(a) has run.

5. Submitted by.



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Office of the Chief Prosecutor

